

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration**

[Preemption Determination No. PD-4(R);
Docket No. PDA-6(R)]

California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids; Decision on Petition for Reconsideration

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of decision on petition for reconsideration of administrative determination of preemption.

PETITIONER: California Highway Patrol (CHP).

STATE LAWS AFFECTED: California Vehicle Code (VC), Division 14.7 (sections 34000-34102), and California Code of Regulations (CCR), Title 13, Chapter 6, Article 3 (sections 1160-1168) and Article 6 (sections 1190-1197).

APPLICABLE FEDERAL REQUIREMENTS: Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

MODE AFFECTED: Highway.

SUMMARY: RSPA's Associate Administrator for Hazardous Materials Safety is denying CHP's petition for reconsideration of the determination that California's requirement for an annual inspection of cargo tanks and portable tanks used for highway transportation of flammable and combustible liquids was preempted by the former Hazardous Materials Transportation Act (HMTA) (since revised, codified and enacted without substantive change at 49 U.S.C. 5101 *et seq.*).

This decision constitutes RSPA's final action on the July 27, 1992 application for a preemption determination filed by Nalco Chemical Co. (Nalco). Any party who submitted comments in Docket No. PDA-6(R) (including the applicant) may seek judicial review within 60 days of this decision.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001, telephone 202-366-4400.

SUPPLEMENTARY INFORMATION:

I. Background

The California Highway Patrol (CHP) administers a design, registration, and

inspection program applicable to cargo tanks and portable tanks on vehicles that transport flammable and combustible liquids on highways within California. See VC Div. 14.7 and § 34001. Excluded from the CHP's Cargo Tank (CT) program are, among others, a vehicle's own fuel tanks; tanks smaller than 120 gallons (or most tanks smaller than 500 gallons that meet DOT specifications); empty tanks (with less than 120 gallons of residue); and intermodal IM 101 and 102 portable tanks when the highway portion of an interstate shipment is less than 25 miles from an "ocean port or railroad loading or unloading terminal." VC 34003(a). See also the discussion in Preemption Determination (PD) No. 4(R), 58 FR 48933, 48934 (Sept. 20, 1993).

In July 1992, Nalco applied for a determination that the HMTA preempted major portions of California's CT program. Following notice of Nalco's application in the **Federal Register**, 57 FR 38081 (Aug. 21, 1992), and the receipt of written comments from all interested parties, RSPA issued its determination in PD-4(R) that the former HMTA:

(a) preempted California's requirement for an annual inspection of cargo tanks and portable tanks used for highway transportation of flammable and combustible liquids, as that requirement is applied and enforced, because any wait for the arrival of State inspectors from another location constitutes an "unnecessary" delay;

(b) did not preempt California's requirement for an annual registration, as applied and enforced, because there is no evidence that this requirement creates any delays separate from the wait for an inspection to be conducted;

(c) did not preempt California's statute authorizing design and construction standards for cargo tanks and portable tanks used to transport flammable and combustible liquids, because there is no evidence that California enforces design and construction requirements, with respect to tanks meeting DOT specifications, that are not substantively the same as requirements in the HMR; and

(d) preempted the following State marking requirements, when applied to DOT specification cargo tanks and portable tanks, because they are not substantively the same as requirements in the HMR: (1) That a metal identification plate be affixed to any tank for which such a plate is not required by the HMR (13 CCR 1195); (2) that a "CT number" be marked on the tank or on a metal identification plate on the tank (13 CCR 1194); and (3) that a certification label be affixed to the

tank and a registration certificate be carried in a waterproof holder permanently attached to portable tanks (VC 34044 and 13 CCR 1193).

RSPA did not decide whether the former HMTA preempted either: (a) California's registration fees, since no party contended that the fees are inequitable or used for purposes other than those related to the transportation of hazardous materials, or (b) the requirement that the remote secondary control for internal valves be clearly labeled (13 CCR 1197), in the absence of any evidence that Nalco or any other party submitting comments is directly affected by this requirement.

RSPA's determination did not address similar California registration, inspection and certification requirements applicable to vehicles and tanks used to transport hazardous wastes, but noted that these requirements are subject to the same Federal preemption provisions and the general principles discussed in PD-4(R). RSPA also noted that its determination did not consider or affect State motor vehicle inspection and registration requirements that apply to all commercial vehicles.

Within the 20-day time period provided in 49 CFR 107.211(a), CHP filed a petition for reconsideration of RSPA's decision in PD-4(R). CHP certified that it had mailed a copy of its petition to Nalco and all others who had submitted comments, in accordance with 49 CFR 107.211(c). Four parties responded to CHP's petition for reconsideration: Nalco, National Tank Truck Carriers, Inc. (NTTC), Chemical Waste Transportation Institute (CWTI), and the 3M Corporation (3M).

In Part II of the decision in PD-4(R), RSPA set forth the standards for making determinations of preemption under the former HMTA and the specific statutory provisions under which non-Federal requirements governing the transportation of hazardous materials are preempted. 58 FR at 48934-35. On July 5, 1994, President Clinton signed Public Law 103-272 which extensively revised, codified and enacted without substantive change numerous laws related to transportation. The former HMTA, 49 App. U.S.C. 1801 *et seq.*, has been repealed and replaced by 49 U.S.C. Chapter 51 (5101 *et seq.*), "Transportation of Hazardous Material," except as to "proceedings that were begun before July 5, 1994." Accordingly, the preemption provisions in former 49 App. U.S.C. 1804 and 1811, discussed in Part II of PD-4(R), remain applicable to RSPA's consideration of this petition for reconsideration. However, since Congress made no substantive change in

passing 49 U.S.C Chapter 51, this decision will cite to the preemption criteria as presently set forth in 49 U.S.C. 5125.

II. Petition for Reconsideration

CHP's petition seeks reconsideration of the decision in PD-4(R) that 49 U.S.C. 5125(a) preempts California's requirement for an annual inspection of cargo tanks and portable tanks used to transport flammable and combustible liquids. It does not contest RSPA's determination that 49 U.S.C. 5125(b) preempts certain requirements for marking these tanks, although CHP states that it "will petition RSPA for a waiver of preemption" as to the requirement for a "metal identification plate on a non-spec cargo tank (13 CCR 1195)." With respect to the annual inspection requirement, CHP asks for "correction of [three alleged] factual errors," and it asks three questions for "written clarification of the application of the preemption [determination]."

First, CHP contends that there was no "current substantive evidence that significant delays were still being experienced." According to CHP, the comments by Union Pacific Railroad Co. (UPRR) and CWTI concerned the separate (but similar) requirements imposed on transporters of hazardous waste, under California's Hazardous Waste Vehicle and Container Inspection and Certification Program (HWIC), rather than the delays currently being experienced under the CT Program. CHP refers to the availability of temporary registration under the CT program, which supposedly eliminates the delays experienced in the HWIC Program. And it reiterates that it "has more than doubled the number of inspectors statewide since UPRR's comments were made * * * and invited Nalco to update [its] experience."

CHP charges that comments by both Nalco and 3M are "invalid," on the ground that these comments did not consider changes made to the CT Program between 1990 and 1993. CHP alleges that the Hazardous Materials Advisory Council (HMAC) and NTTC did not provide substantial or substantive evidence of a burden on commerce or an obstacle to compliance with the Federal hazardous material transportation law and the HMR. CHP also argues that comments "about the proliferation of other states' programs failed to address the addition of 34120 and 34121 VC which authorized reciprocity with CT Programs by other States and the Federal Government."

Second, CHP asserts that RSPA has improperly interpreted 49 CFR 177.853(a) to prohibit "safety related

delays, including compliance with mandatory inspection programs [which] are legitimate reasons for delay." It argues that the intent of this regulation "was to balance safe transportation of hazardous materials with the need for their expeditious delivery," and that RSPA's determination "implies that delays for any reason (other than as specifically authorized)"—including bad weather, road hazards, driver rest periods, and holidays—are "unnecessary." CHP also argues that 177.853(a) should not apply to any delays after delivery of the tank's contents, since that is the "point of 'final discharge at destination.'"

Third, CHP states that RSPA also may not clearly understand—and that HMAC and NTTC failed to investigate or address—California's

Temporary registration process that allows the carrier to simply forward the registration fees via a telegraphic money order and carry a copy as temporary cargo tank registration for up to 10 days (see 13 CCR 1190.1(b)) as proof of registration.

CHP asserts that a carrier's ability to "obtain a temporary cargo tank registration for any out-of-state based cargo tank 24 hours a day, 365 days a year" avoids delays, because the temporary registration allows the tank to enter the State, be unloaded, and then be presented for inspection. CHP continues that a 1992 amendment to the inspection requirement "allows the carriers to freely move a tank that contains only residue throughout the State without current registration," so the carrier is subject to citation only if it reloads the tank with a flammable or combustible liquid after failing to be inspected within 10 days of entering California.

Besides these alleged errors, CHP asks RSPA to answer the following questions to clarify the ruling in PD-4(R):

1. Given the fact that the HMTUSA allows the State the authority to require a cargo tank registration program (separate from the inspection program), can the State require some form of proof of registration be carried with the packaging (cargo or portable tank) either directly on the packaging or carried in the vehicle (or vehicle combination)?

2. Based on the fact that HMTA allows the State to operate a registration program, can the State require some means of positively identifying the packaging in order to verify its registration (keeping in mind that nearly all bulk packagings have some type of unique identifier)? Please note that non-specification (DOT) packagings which require no identification are the central issue.

3. Is our understanding of the ruling correct in that the mandatory inspection and certification is only preempted for tanks based out of California (i.e., the State is not preempted from requiring a mandatory

inspection of tanks based in California as the operators of these tanks have adequate opportunity to have the tanks inspected prior (up to 60 days prior) to the expiration of the previous registration/certification)?

III. Comments Responding to the Petition for Reconsideration

Three parties submitted comments opposing CHP's petition for reconsideration: Nalco, NTTC, and CWTI. In addition, 3M stated that it now uses portable tanks that are no longer covered by the CHP inspection requirement (although it incurred costs "in reverting to drum shipments and back to portable tanks once the amendment became effective"), and thus was withdrawing its earlier comments.

As it had earlier, Nalco acknowledges "improvements in California's registration and inspection processing," but contends that "delays continue to be encountered, both in this program and in the immediately parallel program on wastes." It asserts that CHP's "focus is misplaced," because the "primary issue is not the minutes or hours of delay as they affect a particular tank on a particular day but, rather, whether the delay is 'unnecessary' as that term is used in the regulations." Nalco contends that RSPA has not misinterpreted 49 CFR 177.853(a) because "[e]xpeditious delivery is a safety issue, not a commercial one."

NTTC disagrees that any of the parties had "confused" the requirements of California's HWIC and CT Programs or that there was any error from an alleged failure to respond to the changes in the CT Program which CHP implemented between 1990 and 1993. NTTC quotes the language at 58 FR 48933 stating that PD-4(R) "does not address" the HWIC Program, and it asserts that RSPA properly considered "the fact patterns as presented in the original petitions."

NTTC contends that temporary registration will not prevent delays. It states that, even if a carrier's headquarters "telegraphs a money order to CHP," the truck may depart before confirmation of registration, and "geography and time zone differences assure that the driver will not have a copy of the documentation." NTTC also presents situations in which delays would exceed the 10-day period permitted for inspection, under a temporary registration:

Truck deliveries may be made during weekends or at hours when inspectors are not available. Inspectors take holidays, they call in sick or they may be redispached to more pressing duties. Surely the state is not asserting that a vehicle "hang around" until such contingencies are resolved?

NTTC also states that the "reciprocity provisions" in the CT program are illusory, because "CHP failed to give but one example of another state joined by such provisions." According to NTTC, "the extension of reciprocity is discretionary. There are no readily-available criteria upon which a carrier (or even another state) can rely to determine whether or not an existing program is 'reciprocal' with California."

CWTI similarly argues that "reciprocity has not materialized." It asserts that CHP's discussion of "factual errors" and "changes to the CT program" miss the point of the decision in PD-4(R): "To the extent [that] CHP can demonstrate to RSPA that its CT program no longer causes 'unnecessary' delay, the CHP may begin to apply and enforce its requirements." CWTI contends that CHP has not eliminated unnecessary delay, even by hiring more inspectors:

The unavailability of inspectors, however, is only part of the unnecessary delay problem. Delay also results from the advance notification of hazardous materials shipments which must attend all inspections in order to arrange for the inspection and routing of vehicles and bulk packagings to inspection locations, as well as delays which may result from the logistics of obtaining, completing, and filing authorized documentation of vehicle/bulk packaging registration and fees.

CWTI likens delays for bad weather and holidays to "acts of God," and states the "key point" to be that "state program deficiencies evidenced by a lack of inspectors and/or inspection locations do not justify delay in the transportation of hazardous materials." Citing the legislative history and findings in the 1990 amendments to the former HMTA, CWTI argues that unnecessary delay inhibits safety, not just commerce. And it states that RSPA is the proper agency to balance what CHP asserts are competing goals of "safe transportation" and "expeditious delivery."

CWTI initially accepted statements in the petition for reconsideration that CHP "'routinely find(s) tanks that are not in compliance with the HMR,'" as short as one day after certification by a DOT-registered facility, but argued that this simply proves that "any inspection is as good as the point in time in which it is conducted," and "roadside inspections are vital to ensuring the safe transportation of hazardous materials." (In supplemental comments dated November 17, 1993, CWTI disagreed with CHP's statements of routinely finding tanks in violation of the HMR, based on data in the Federal Highway Administration's 1992 Annual Report.

These supplemental comments are not necessary for reaching a decision on CHP's petition for reconsideration.) CWTI asserted that, rather than proceeding with "unilateral state action," CHP should provide more specific data to support its concern that periodic inspections under DOT's regulations are inadequate.

CWTI finds CHP's statements concerning the absence of temporary registration under the HWIC Program is an admission that "the HWIC program causes 'unnecessary delay.'" It requests that "RSPA repeat in as strong of terms as possible its directive that the CHP desist applying and enforcing the HWIC program in a manner which is inconsistent with the principles contained in PD-4(R)." CWTI also states that RSPA correctly decided that 49 U.S.C. 5125(b) preempts California's marking requirements, and that CHP should have "participate[d] in the formulation of federal requirements for the marking/certification of cargo tanks used for the transportation of hazardous materials," in RSPA's rulemaking Docket No. HM-183. CWTI notes that RSPA reached no conclusion about the registration fees under the CT Program, and comments that the requirement that fees be equitable, in former 49 App. U.S.C. 1811(b) (reworded as "fair" in 49 U.S.C. 5125(g)), is generally violated when "fees remain unapportioned for carriers operating in interstate commerce."

Nalco, NTTC and CWTI all challenge CHP's implicit positions, in the questions, that it would be appropriate to require proof of registration to "be transported with the packaging (cargo or portable tank)" and "some means of positively identifying the packaging in order to verify its registration." NTTC states that all tanks have some means of identification; "[e]ven non specification cargo tanks have VIN numbers." Nalco agrees, stating that as part of the registration process, States gather information about the registrant and its equipment and can "provide it directly to their inspectors without having to decorate the interior or exterior of the vehicle for each jurisdiction for the inspectors' convenience." CWTI opposes what it calls CHP's "efforts to reassert a linkage between specific vehicles and registration." It alleges the "burden that would result if other states insisted on unique numbers and shipping paper requirements," and refers to recommendations of a working group on uniform forms and procedures for registration and permitting, under 49 U.S.C. 5119. According to CWTI, the working group has recommended State registration of hazardous materials

carriers, not specific vehicles or packagings.

Nalco and NTTC disagree with CHP's conclusion that an annual inspection may still be required for cargo tanks and portable tanks based in California. They consider that the decision in PD-4(R) applies to all tanks regulated by the HMR, and Nalco comments that, "in light of the anticipated rule in Docket No. HM-200," the small number of tanks presently not governed by the HMR "does not warrant the confusion that would be caused by a State program addressed only to these units."

IV. Discussion

As discussed in PD-4(R), Nalco's original challenge to California's inspection requirement, in 1990, was accompanied by an affidavit setting forth specific dates that "filled incoming tanks" were held waiting the arrival of a CHP inspector, "thereby delaying delivery to customers." 58 FR at 48938. Two parties submitting comments in the original proceeding (designated IRA-53) provided specific time periods for CHP's delays in inspecting tanks: Union Pacific cited waits of up to five days for inspections at its intermodal ramps (which CHP states referred only to tanks containing hazardous wastes), and CWTI stated that it had encountered "delays of two to three days for an inspection" of tanks used for hazardous wastes. 58 FR at 48939.

After the application in IRA-53 was returned to Nalco, and Nalco petitioned for an administrative determination of preemption pursuant to what is now 49 U.S.C. 5125(d), no party submitted further information as to the specific periods that cargo tanks and portable tanks used for flammable and combustible liquids were being delayed. Rather, Nalco stated that "improvements and pre-payment options have speeded the issuance of instructions to the field * * *, but unnecessary delays are still encountered * * * compounded by inspector[s'] schedules, vacations and sick leave." 48 FR at 48938. CHP acknowledged that some delays still exist, despite modifications such as reducing the number of tanks subject to inspection, increasing the number of inspectors, establishing inspection stations at four port-of-entry locations, and providing a 10-day temporary registration that allows a carrier to enter California and deliver its load before being inspected.

At no time, however, in its prior comments or in its petition for reconsideration, has CHP contended that it has eliminated situations where the transportation of a loaded tank must be interrupted and wait for the arrival

of an inspector. Rather CHP acknowledged, in its opening comments in PDA-6(R), that "some instances have resulted in inspections not being performed in as timely a manner as the CHP or industry would like * * * due to lack of adequate planning on the part of both the operator and the CHP." In its rebuttal comments, CHP stated that, with the "current [inspection] staff and the four POE facilities we can inspect nearly all out-of-state domiciled cargo tanks without any diversion or delays." It contended that the remaining delays encountered in performing inspections are reasonable, justified and not "unnecessary" based on the number of violations found—as CHP again contends in its petition for reconsideration.

RSPA's decision in PD-4(R) did not ignore safety, but rather followed the prior inconsistency rulings in which RSPA consistently found that the safe transportation of hazardous materials is advanced by 49 C.F.R. 177.853(a) which prohibits "unnecessary" delays. See the discussion at 58 FR 48939-41. The argument in CHP's petition for reconsideration that safety justifies delays does not provide any answer. Safety has been alleged as the basis of every non-Federal requirement that has been challenged, and considered by RSPA, since the former HMTA first provided for the preemption of "inconsistent" State and local requirements.

The only difference cited by CHP to distinguish the CT inspection program and the HWIC program applicable to carriers of hazardous waste is the availability of a 10-day temporary registration under the CT program only. Whether or not the procedures for temporary registration can eliminate delays, there is no information that they have eliminated delays. Moreover, NTTC asserts that temporary registration will not always prevent delays.

The CT and HWIC inspection programs appear to be otherwise similar, and the inspections under both are conducted by CHP. For that reason, RSPA must assume that waits experienced by transporters of hazardous waste (such as UPRR and CWTI) are representative of waits faced by an interstate carrier of flammable or combustible liquids, when that carrier is unable to obtain a temporary registration or plan its arrival to allow for inspection at a POE location.

In addition, CHP's admissions that it has not eliminated situations where loaded tanks must wait for an inspector to arrive to conduct an inspection make the specific number of days' wait cited

by UPRR and CWTI unnecessary for RSPA's decision.

The decision in PD-4(R) was a narrow one. As specifically noted there, RSPA encourages State and local governments to adopt and enforce the requirements in the HMR through inspections. 58 FR 48940-41. During fiscal 1994, DOT provided grants in excess of \$64 million to all States, and \$3.2 million to California, to carry out inspections under the Federal Motor Carrier Assistance Program. See generally 49 CFR Part 350 governing grants "to encourage each State to enforce uniform motor carrier safety and hazardous materials regulations for both interstate and intrastate motor carriers and drivers." 49 CFR 350.5.

Moreover, RSPA agreed with all parties that the time involved to conduct a tank inspection was reasonable, and not unnecessary, including any time waiting one's "turn" for an inspector already present. 58 FR at 48941. But RSPA found that forcing a tank to wait for the arrival of an inspector from another location was an "unnecessary" delay, and because California's CT program was not free from these kinds of delays it created an obstacle to the accomplishment and execution of the Federal hazardous material transportation law and the HMR. California "may not require an inspection as a condition of travelling on California's roads when the inspection cannot be conducted without delay because an inspector must come to the place of inspection from another location." *Id.* For that reason, RSPA found that the provision now codified at 49 U.S.C. 5125(a) preempted the inspection requirement in VC 34060 and 13 CCR 1192, as that requirement was being applied and enforced.

If and when California eliminates the unreasonable delays in its inspection program, that requirement will no longer be preempted. Nothing in CHP's petition for reconsideration, however, provides any basis for RSPA to change the decision in PD-4(R).

It is not possible to provide complete answers to CHP's three questions for clarification of the decision in PD-4(R), since preemption under the "obstacle" criterion depends upon the manner in which a non-Federal requirement is enforced and applied. (See also the statement in H.R. Rep. 101-444, 101st Cong., 2d Sess. 49, that Congress did not intend for DOT to be a "clearing house for obtaining advisory opinions with respect to legislative or regulatory ideas and notions prior to enactment.") However, the following responses can be made:

1. CHP has asked about requirements for "some proof of registration * * * directly on the packaging or carried in the vehicle." As specifically discussed in PD-4(R), unless otherwise authorized by Federal law, any non-Federal requirement for a "marking * * * of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material" is preempted unless it is "substantively the same as" the requirements in the Federal hazardous material transportation law and the HMR. 49 U.S.C. 5125(b)(1)(E). See 58 FR at 48936-37. A requirement to carry additional documentation on a vehicle transporting hazardous materials, beyond that required in the HMR, may create an obstacle to the accomplishment and execution of the Federal hazardous material transportation law and the HMR. See *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1581 (10th Cir. 1991).

2. CHP has asked about "some means of positively identifying the packaging" and noted that its concern is primarily with non-DOT specification packagings, since all DOT specification tanks subject to the CT program have a metal identification plate and, in some instances, a separate metal certification plate. As discussed in PD-4(R), any marking on the tank itself is a "marking * * * of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material." 49 U.S.C. 5125(b)(1)(E); 58 FR 48937. To the extent that non-specification packagings do not already contain some unique identifying characteristic and California believes that they must in order to transport hazardous materials, California may submit a petition for rulemaking in accordance with 49 CFR part 106.

3. CHP has asked about the application of the decision in PD-4(R) to "tanks based in California." However, it does not indicate whether it assumes that these tanks remain completely within California or travel throughout the United States. Tanks that never leave California would not experience delays associated with entering the State or being rerouted around California. See PD-5(R), Massachusetts Requirement for an Audible Back-up Alarm, etc., 58 FR 62707, 62710 (Nov. 29, 1993). On the other hand, "tanks based in California" which are used in other States may well experience the same types of delays as "tanks based out of California."

V. Ruling

For the reasons stated above, the CHP petition for reconsideration is denied.

This decision incorporates and reaffirms the determination set forth at 58 FR 48933 that the provisions now codified at 49 U.S.C. 5125(a) and (b) preempt:

A. California's requirement in VC 34060 and 13 CCR 1192 for an annual inspection of cargo tanks and portable tanks used for highway transportation of flammable and combustible liquids, as that requirement is applied and enforced, because any wait for the arrival of State inspectors from another location constitutes an "unnecessary" delay.

B. VC 34042(d) and 34061(c), which provide that the failure to make a cargo tank or portable tank available for inspection is a ground for denial, suspension or revocation of registration, and 13 CCR 1193, requiring that cargo tanks and portable tanks transporting flammable and combustible liquids pass an inspection to be certified.

C. The following requirements to mark cargo tanks and portable tanks transporting flammable and combustible liquids, because they are not substantively the same as requirements in the HMR: (1) 13 CCR 1195, that a metal identification plate be affixed to any tank for which such a plate is not required by the HMR; (2) 13 CCR 1194, that a "CT number" be marked on the tank or on a metal identification plate; and (3) VC 34044, 34101 and 13 CCR 1193, that a certification label be affixed to the tank and that a registration certificate be carried in a waterproof holder permanently attached to a portable tank, together with the provisions for removal of the certification label in VC 34062-63.

VI. Final Agency Action

In accordance with 49 CFR 107.211(d), this decision constitutes

RSPA's final agency action on Nalco's application for a determination of preemption as to the above-specified California requirements applicable to cargo tanks transporting flammable and combustible liquids. Any party to this proceeding "may bring a civil action in an appropriate district court of the United States for judicial review of [this] decision * * * not later than 60 days after the decision becomes final." 49 U.S.C. 5125(f).

Issued in Washington, D.C. on February 7, 1995.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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